District Court, Boulder County, State of Colorado 1777 6th Street, Boulder, Colorado 80306 (303) 441-3750	DATE FILED: February 18, 2020 CASE NUMBER: 2018CV31116
Plaintiff: Erie Thriving, LLC **v.** **Defendants: Town of Erie, Colorado,** a municipal corporation, statutory town and political subdivision of the State of Colorado; **Jennifer Carroll,** in her official capacity as the Mayor of Town of Erie, **Geoff Deakin,** in his official capacity as a trustee and Mayor Pro Tem for the Town of Erie, **Scott Charles, Bill Gippe, Adam Haid, Christiaan van Woudenberg,** and **Dan Woog,** in their official capacities as trustees for the Town of Erie, and, **Intervenor-Defendant: Crestone Peak Resources, Inc.**	**▲COURT USE ONLY▲** Case Number: 18CV31116 Division 5 Courtroom L

ORDER REGARDING TOWN DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Town Defendants' Second Motion for Summary Judgment. The Town of Erie (Town), Jennifer Carroll, Geoff Deakin, Scott Charles, Bill Gippe, Adam Haid, Christiaan van Woudenberg, and Dan Woog, collectively Defendants, filed their second motion for summary judgment on December 9, 2019. Plaintiff, Erie Thriving, filed a response on January 6, 2020. Defendants filed a reply on January 20, 2020. The Court, having considered the case file, pleadings, and applicable law, now issues the following findings and orders.

I. BACKGROUND

Plaintiff Erie Thriving LLC, a nonprofit group established to protect the health, safety, property, and democratic rights of its members, filed a complaint against the above named Defendants on December 3, 2018, initiating this case. Plaintiff seeks declaratory

judgment and injunctive relief from an Operator Agreement (also referred to as the Agreement) between the Town of Erie and Crestone Peak Resources (Crestone) which permits Crestone to drill new oil and gas wells at certain drilling pads in Erie.

In its initial complaint, Plaintiff sought relief on six grounds: the Agreement deprived its members of procedural and substantive due process rights, the Town did not have authority to enter the Agreement because of state law preemption, the Agreement was entered into in violation of Colorado Open Meeting Laws, the Agreement was entered into in violation of Erie's zoning laws and Uniform Development Code, the Agreement was entered into in violation of Erie's zoning laws and Uniform Development Code, and the Agreement constitutes common law trespass.

On January 25, 2019, Defendants filed a Motion to Dismiss, arguing that all of Plaintiff's claims should be dismissed under various C.R.C.P. 12 theories. On March 15, 2019, the Court granted Defendants' motion in part and denied it in part. It dismissed Plaintiff's claims regarding state law preemption and common law trespass with prejudice. It dismissed Plaintiff's claim regarding zoning laws and the Uniform Development Code without prejudice. The Court did not dismiss the other claims.

Plaintiff filed a First Amended Complaint on March 25, 2019, this time articulating four grounds on which it seeks declaratory judgment and injunctive relief: (1) the Agreement deprived its members of procedural and substantive due process rights, (2) the Agreement was entered into in violation of Colorado Open Meeting Laws, (3) the Agreement was entered into in violation of Erie's zoning laws and Uniform Development Code, and (4) the Agreement was entered into in violation of Erie's zoning laws and Uniform Development Code.

The Town filed an answer on April 8, 2019. Then, on August 27, 2019, the Town filed a motion seeking summary judgment on claims (3) and (4). The Court found that on claims (3) and (4), Defendants were entitled to judgment as a matter of law and granted Defendants' Motion for Partial Summary Judgement.

Defendants filed a Second Motion for Summary Judgment on December 9, 2019, arguing that they are entitled to judgment as a matter of law on remaining claims (1) and (2) of Plaintiff's First Amended Complaint. Plaintiff filed a response on January 6, 2020. Defendants filed a reply on January 20, 2020. Now ripe, the Court considers Defendants' Second Motion for Summary Judgement.

II. LEGAL STANDARD

A party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. C.R.C.P. 56(c). Summary judgment permits courts to save the time and expense of going to trial when, as a matter of law, one party could not prevail. *Ginter v. Palmer and Co.*, 585 P.2d 583, 584 (Colo. 1978). However, summary judgment is a drastic remedy that denies litigants their right to trial, so is not warranted except on a clear showing that there is no genuine issue as to any material fact. *Id.*

The party moving for summary judgment has the burden of establishing that no genuine issue of material fact exists and must inform the court of the basis for the motion and identify the portions of the record that the moving party believes demonstrate the absence of a genuine issue of material fact. *Urban v. Beloit Corp.*, 711 P.2d 685, 687 (Colo. 1985); *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). This is true even if the non-moving party would bear the burden of proving the alleged facts at trial. *Urban*, 711 P.2d at 687. However, where the non-moving party would bear the burden of persuasion at trial, the moving party may satisfy its initial burden by showing the court that there is an absence of evidence in the record to support the non-moving party's case. *Continental Air Lines*, 731 P.2d at 712; *Griswold v. Nat'l Fed'n of Indep. Bus.*, 449 P.3d 373, 378 (Colo. 2019). In determining whether summary judgment is proper, the nonmoving party must receive the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts. *Manusco v. United Bank of Pueblo*, 818 P.2d 732 (Colo. 1991).

Once the moving party meets this initial burden, the burden shifts to the non-moving party to establish that there is a triable issue of fact. *Continental Air Lines*, 731 P.2d at 713. The nonmoving party may not rest on mere allegations or demands, rather they must provide specific facts demonstrating a genuine issue for trial. *Department of Revenue v. Agilent Technologies, Inc.*, 441 P.3d 1012, 1016 (Colo. 2016). If the non-moving party cannot muster sufficient evidence to show that there is a triable issue of fact, a trial would be useless, and the moving party is entitled to summary judgment. *Id.*

III. PENDING CLAIMS

Defendants claim they are entitled to summary judgment on Plaintiff's two remaining claims for relief. The Court considers each in turn.

1. Procedural and Substantive Due Process Right Violations

To start, Defendants move for summary judgment on Plaintiff's claims that approving the Operator Agreement violated Plaintiff's procedural and substantive due process rights.

A. Arguments

In its First Amended Complaint, Plaintiff claims that by approving the Operator Agreement Defendant violated its members' procedural and substantive due process rights.

Defendants moved for summary judgment on both claims, arguing that Plaintiffs were not deprived of any constitutionally protected interest. But, they argue that even if they were, undisputed facts show that there was sufficient notice and opportunity for comment, thus no procedural due process violation. Further, they argue that there was no substantive due process violation because approving the Agreement was rationally related to a legitimate government interest.

Plaintiff counters that there was insufficient notice and opportunity to be heard on the Operator Agreement – they assert that disputed facts exist about whether the process approving the Agreement was fundamentally fair. Further, Plaintiff contends that there are facts in dispute which show the Town arbitrarily and capriciously deprived its members of substantive due process rights, and that the Town's actions did not further any legitimate governmental interest.

B. Law, Analysis, and Ruling

Procedural Due Process

i. Applicable Law

Procedural Due Process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). In alleging a deprivation of procedural due process, plaintiffs must first demonstrate the source of the property interest which enables them to assert the constitutional claim. *Blake v. Dep't of Pers.*, 876 P.2d 90, 97 (Colo. App. 1994). Something more than a subjective expectancy must be at stake to warrant the protections of procedural due process. *Id.*

Once a plaintiff has shown a constitutionally protected interest, courts must decide whether there was sufficient notice and opportunity to be heard. *Van Sickle v. Boyes*, 797 P.2d 1267, 1273 (Colo. 1990). The essence of procedural due process is fundamental fairness – thus, due process is flexible and calls for such procedural protections as the particular situation demands. *Id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *DeKoevend v. Board of Educ.*, 688 P.2d 219, 227 (Colo. 1984). Three factors must be weighed in determining if a plaintiff was afforded procedural due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Eldridge*, 424 U.S. at 335.

ii. Analysis & Ruling

Defendant first asserts that Plaintiff has not articulated a constitutionally protected interest which is necessary to sustain a due process claim. Plaintiff claims that the Town, by approving the Operator Agreement, exposed its members who live nearby to risks such as explosions, fires, air pollution, benzene exposure, subsidence, oil spills, and water contamination that will cause injury. Under existing case law it is unclear to the Court if plaintiffs actually assert a sufficient property interest but for purposes of its analysis, the Court assumes that Plaintiff does have a property interest that enables them to assert this constitutional claim.

Plaintiff then alleges, that there were five flaws in the Town's approval of the Operator Agreement that deprived them of procedural due process. Defendant's argues that none of the alleged deficiencies amount to a deprivation of Plaintiff's due process rights, so the Court may rule on the issues as a matter of law. Both Defendant's arguments and Plaintiff's responses focus on the procedures prong of the *Matthews* test.

The Court finds that the both the Plaintiff's and the Town have interests at stake. The central inquiry for the Court then is the whether the procedures used created a risk of erroneous deprivation of Plaintiff's interests and whether the procedures used were fundamentally fair.

1. Crestone's Type B Application

Plaintiff contends that the Town used Crestone's Type B permit application to create the appearance of a quasi-judicial proceeding while allowing Crestone to negotiate the Operator Agreement without public scrutiny. Defendant contends that the quasi-judicial

nature of the Type B application, and thus lack of public comment, is irrelevant because the Operator Agreement was not quasi-judicial and public comment was not only allowed but specifically elicited.

Crestone's Type B application and its classification as a quasi-judicial action is separate from the Operator Agreement. Whether the public was able to comment on the Type B application is irrelevant here. Whether the public was able to comment on the Operator Agreement is relevant. It is undisputed that the Board discussed the Operator Agreement at public meetings on October 27, 2018, October 30, 2018, and November 4, 2018. It is also undisputed that the public was able to comment on the Operator Agreement at those meetings. There was also an email address people could send comments on the Operator Agreement to at any time. Additional or substitute procedures would not better protect against an erroneous deprivation of Plaintiff's property interest. The Court holds that classifying Crestone's Type B Application as quasi-judicial while simultaneously negotiating a separate Operator Agreement about which the public could hear discussions and make comment was not fundamentally unfair. Thus, the Court finds no procedural due process violation on this issue.

2. October 27, 2018 Meeting

Plaintiffs contend that the Town placed unreasonable restrictions on public participation at the October 27, 2018 meeting by only permitting Erie residents to attend, by changing the location to the Erie Police Department with little notice, and by making people pre-register and pass through metal detectors. Defendants argue that those facts do not give rise to a due process violation, especially because there were two subsequent meetings and because people always had the ability to submit comments through email.

The Court agrees with Defendants. The fact that the meeting was held in the police department, that attendees had to pass through metal detectors, and that attendees who pre-registered were given priority at the entrance do not, even in sum, amount to a due process violation. Plaintiff's property interest would not be better protected if the meeting was held elsewhere or if attendees did not have to pass through metal detectors. Plaintiff does not contend (nor would the court expect them to based on their Open Meetings Law notice claims) that the meeting location should have been changed last minute to accommodate a larger crowd.

The Court does note that Broomfield resident's property interests might have been better protected if the Town board did not prioritize entry based on residency. However, there were two other meetings Broomfield residents could attend on the same matter, and the Town's selected method of prioritizing attendees was not fundamentally unfair

considering it was a meeting of the Erie Board of Trustees, not the Broomfield Board of Trustees. Considering all that, the Court finds that the October 27, 2018 meeting did not violate Plaintiff's procedural due process rights.

3. October 30, 2018 and November 4, 2018 Meetings

Plaintiff contends that the October 30, 2018 and November 4, 2018 meetings were improperly noticed, did not afford citizens a meaningful opportunity to review the application, and excluded many residents from the meetings altogether. Defendants assert that undisputed facts show that each of the meetings was held after at least 24 hours' notice to the public and that citizens had the opportunity to and did engage in substantial public comment at each meeting before the board voted on the matter.

The Court finds that the public was provided notice of both the October 30, 2018 and November 4, 2018 more than twenty-four hours prior to the meetings. That complied with the notice requirements of § 24-6-402. Plaintiff does not directly challenge the constitutionality of that statute and statutes are presumed constitutional. *See e.g. People v. Sneed*, 514 P.2d 776, 778 (Colo. 1973). The Court holds there was no constitutional issue with the notice provided for the October 30, 2018 and November 4, 2018 meetings.

Further, the Court finds that the public was provided sufficient time to review and understand the Operator Agreement. The evidence before the Court shows that an updated version of the Operator Agreement was posted to the Town's website on November 2, 2018 – two days before the meeting at which it was approved. Additionally, Deputy Town Administrator gave a presentation at the November 4, 2018 meeting that outlined the changes to the Agreement. TOE Exhibit L, p. 4-17. Following that, there was an opportunity for public comment before the Board voted on whether to approve the Agreement. TOE Exhibit L, p. 18-196; *Sheep Mountain Alliance v. Bd of Cty Com'rs, Montrose Cty*, 271 P.2d 597, 603 (Colo. App. 2011) (court found no due process violation where the public had ample opportunity to comment on a matter before the board of commissioners). Based on those undisputed facts, the Court finds the procedures afforded were not fundamentally unfair. Thus, the Court finds no procedural due process violation on this issue.

4. Crestone's Attempt to Flip Votes

Plaintiff contends that Crestone, in coordination with the Town, had Trustee van Woudenberg identify what additional provisions would be necessary to obtain his vote, essentially engaging in secretive back room bargaining. Defendants counter that those allegations do not constitute a deprivation of procedural due process because no law

prohibits that type of communication, the public was able to directly comment on the changes suggested by Trustee van Woudenberg, and that ultimately Trustee van Woudenberg voted against the Agreement anyways.

It is undisputed that Crestone's representative, Jason Oates, met with Trustee van Woudenberg following the October 30, 2018 meeting to see if adding certain provisions to the Agreement could secure his vote in favor of approving it. Plaintiff's Exhibit 5, 38:22-39:13. Following the meeting, Crestone incorporated several additional Best Management Practices into the Operator Agreement. Additionally, Following the meeting, the public had a chance to review the updated Agreement, including the additional BMPs, and discuss the matter at a hearing. It is unclear to the Court what procedures Plaintiff envisioned might better protect its members' property interests or what they allege was fundamentally unfair about this meeting. Subject to Open Meetings Laws, it is necessary for local governments to negotiate agreements with companies to advance both public and governmental interests. That is what occurred here. The meeting between Trustee van Woudenberg and Jason Oates did not violate Plaintiff's procedural due process rights. As a matter of law, the Court finds that satisfies the *Matthews v. Eldridge* test, thus, the Court finds no procedural due process violation on this issue.

5. Other Procedural Deficiencies

To the extent that Plaintiff alleges that there were numerous violations of the Town Board's own processes leading up to the vote on the Operator Agreement violated their rights to due process, the Court is not convinced. Failure by a city to follow its own land use procedures is not, by itself, a procedural due process violation. *Hillside Cmty. Church v. Olson*, 58 P.2d 1021, 1027 (Colo. 2002). As such, the Court finds that even if the Town did not follow its standard procedures, that does not constitute a procedural due process violation.

Lastly, the Court finds that even cumulatively Plaintiff's claims do not amount to a deprivation of their procedural due process rights.

With respect the entirety of Plaintiff's procedural due process claims, the Court finds that no genuine dispute of material fact exists, and that Defendants are entitled to judgment as a matter of law.

Substantive Due Process

Defendants also moved for summary judgment on Plaintiff's substantive due process claim.

i. Applicable Law

The Colorado Constitution guarantees that "No person shall be deprived of life, liberty, or property without due process of law." Colo. Const. art II, § 25. When reviewing a challenge based on substantive due process of law grounds, courts initially must ask whether the challenged action infringes upon a fundamental constitutional right. *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1008, 1014-16 (Colo. 1982). If the state action does not infringe upon a fundamental right then the applicable test for reviewing a substantive due process challenge is the rational basis test.[1] *City and Cty. of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270, 1277 (Colo. 2010) (citing *Ferguson v. People*, 824 P.2d 803, 808 (Colo. 1992)). Under that test, the party challenging the state action has the burden of establishing beyond a reasonable doubt that the action lacks a rational relationship to a legitimate governmental interest. *Id.*

ii. Analysis & Ruling

Here, just as with the Plaintiff's procedural due process claim, the Court assumes that there is a protected property interest which enables them to assert this constitutional claim. The Court evaluates the merits of the claim to determine if the Town's action – approving the Operator Agreement – was rationally related to a legitimate governmental purpose. Defendants claim that there is a legitimate governmental interest in developing natural resources but also imposing conditions on oil and gas operations. Plaintiffs assert that administrative approval of the Operator Agreement lacks a rational relationship to the stated interest.

The Court finds that here there is a legitimate government interest in permitting natural resource development while regulating oil and gas operations.[2] *See e.g. City of Fort*

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[1] The Court notes that the parties disagree about the appropriate standard of review. Relying on *Lawley*, Plaintiff asserts that the Court should review the claim under an arbitrary and capricious standard. *Lawley v. Dep't of Higher Ed.*, 36 P.3d 1239 (Colo. 2001). Defendant asserts the proper standard is a rational basis review. Unlike in *Lawley* where the plaintiff's challenged the acts of an administrative agency under § 24-4-106(7), Plaintiff's challenge here is based on the constitutional substantive due process right. As such, the Court applies the established rational basis test.

[2] To the extent that Defendants claim that the Town could not ban oil and gas operations thus approval of the operator agreement was necessary to avoid liability, the Court finds that falls under the broader government interest of regulating oil and gas development.

Collins v. Colorado Oil, 369 P.3d 586, 592 (Colo. 2016). The Town's approval of the Operator Agreement was rationally related to that legitimate governmental purpose. Approval of the Operator Agreement both permitted development of natural resources but also allowed the Town to regulate the location and number of wells Crestone could drill, the period of time the Operator Agreement was valid for, and the inclusion of BMP's. Plaintiff argues that there were additional safety measures the Town could have taken prior to approving the Operator Agreement, however the issue before the Court is whether the governmental action is rationally related to a legitimate purpose, not whether the governmental action is devoid of risk or if every step was taken, prior to the government action, to further a governmental purpose.

The Court finds that Plaintiffs cannot not prevail on their claim of substantive due process violations as a matter of law – the Town's action approving the Operator Agreement was rationally related to the legitimate governmental purpose of regulating oil and gas development. As such, the Court finds that there is no genuine dispute of material fact and that Defendants are entitled to judgment as a matter of law on this issue.

C. Conclusion

Based on the Court's findings above, Defendant's Motion for Summary Judgment on Plaintiff's procedural and substantive due process claims is GRANTED.

2. Colorado Open Meeting Law Violations

Next, Defendants assert that they are entitled to summary judgment on Plaintiff's open meetings law claim.

A. Arguments

Plaintiff, in its First Amended Complaint also claims that Defendants violated Colorado Open Meetings Laws (OML). Specifically, Plaintiff argues that:

- Defendants held non-public meetings where public business was discussed or at which formal action was taken.
- Defendants held non-public executive sessions without properly announcing the statute authorizing such a section and identifying the matter to be discussed.

As such, it declines to evaluate it as a separate governmental interest in its due process analysis.

- Defendants held non-public executive sessions during which they considered matters outside those authorized under the OML.
- Defendants held non-public executive sessions wherein they adopted a proposed policy, position, resolution, rule, regulation, or formal action.
- Defendants held non-public meetings at which trustee votes on the Operating Agreement were discussed and decided.
- Defendants held non-public executive sessions outside of a properly scheduled and noticed regular or special meeting.
- Defendants failed to provide full and timely notice of public meetings and executive sessions.
- And, Defendants' public vote on the Operator Agreement at the November 4, 2018 special meeting was littler more than a confirmation of votes taken in one or more non-public meetings.

Plaintiff contends its members were denied or threatened with denial of rights conferred on the public by OML and have suffered an injury in fact to a legally protected interest.

Defendant moved for summary judgment on this claim, arguing that undisputed facts show that the Town fully complied with OML requirements, but even if any OML violations occurred, they were cured by the November 4, 2018 public meeting.

B. Applicable Law

The state legislature created Colorado's Open Meetings Law (OML) based on the belief that formation of public policy is public business and may not be conducted in secret. C.R.S. § 24-6-401. The law requires that all meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken be open to the public. C.R.S. § 24-6-401(2)(b). The law defines a meeting as any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication. C.R.S. § 24-6-402(1)(b).

While meetings of three or more board members must be public, the OML provides that some matters may be discussed privately in executive sessions. Subsection 3 of § 24-6-402 delineates the reasons under which a regular or special public meeting may be taken into an executive session and the procedures the public body must follow to commence that executive section. The body must announce to the public the topic for discussion in the executive session including specific citation to the provision of subsection 3 authorizing the body to meet in an executive session. C.R.S. § 24-6-402(3)(a).

The body must identify the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized. Id. And, two thirds of the body must affirmatively vote in favor of the executive session.

Further, under the OML, the public is entitled to twenty-four hours' notice about any meeting at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action is expected to occur. C.R.S. § 24-6-402(2)(c)(I). That requirement is satisfied if notice of the meeting is posted in a designated public place within the boundaries of the local public body no less than twenty-four hours prior to the holding of the meeting. *Id.* The notice requirement may also be satisfied by an online posting. C.R.S. § 24-6-403(c)(III).

If a local public body violates the OML, it may cure that violation by holding a subsequent complying meeting, provided that the subsequent meeting is not a mere "rubber stamping" of an earlier decision made in violation of the OML. *Colorado Off-Highway Vehicle Coalition v. Colorado Bd. of Parks and Outdoor Recreation*, 292 P.3d 1132, 1137-38 (Colo. App. 2012).

C. Analysis & Ruling

As noted above, in its First Amended Complaint and subsequent pleadings Plaintiff identifies several ways that they allege the Town violated the OML. First, Plaintiffs contend that Erie devised a scheme to circumvent the requirements of the OML by requiring that meetings involve only two Town board members at a time. They argue this occurred by Town board members rotating in and out of meetings and the Deputy Town Administrator or outside counsel informing the new attendee what was discussed with previous attendees. Couched as a separate claim, Plaintiffs allege one specific instance of this occurring. Plaintiffs contend that on November 1, 2018, Mayor Carroll, Trustee van Woudenberg, and Jason Oates, a Crestone representative, meet to discuss potential additional BMPs Crestone could add to the Operator Agreement. After Trustee van Woudenberg left the meeting, Mayor Carroll and Jason Oates either called and reached or attempted to call and did not reach Trustee Gippe.

Defendants assert that rather than a scheme, the fact that no more than two board members were involved in non-public meeting shows compliance with the OML. Defendants also argue that Plaintiff's allegations about a scheme designed to circumvent the OML is not supported under the law.

The Court finds that there are no material facts in dispute related to this claim. Mayor Carroll and Mayor Pro Tem Deakin led the negotiations with Crestone. Plaintiff's Exhibit

10, 43:5-18. The evidence before the Court also shows that there was one negotiation meeting where Trustee van Woudenberg attended and Mayor Pro Tem Deakin did not. Plaintiff's Exhibit 10, 70:4-19. At some point during that meeting, Trustee van Woudenberg left and did not return. Subsequent to Trustee van Woudenberg leaving, Mayor Carroll and Jason Oates attempted to contact Trustee Gippe. Plaintiff's Exhibit 14, p. 7-8; Plaintiff's Exhibit 15, p. 8. It is unclear if they were able to reach Trustee Gippe.

The only issue before the court on this claim is whether, as a matter of law, those undisputed facts show a violation of the OML. Section 26-6-402(2)(b) requires a public meeting when a quorum or three or more members of a local public body discusses public business. The plain language of the OML does not prohibit separate meetings with two or fewer members of a local public body like it does for state-level public bodies. *See* § 24-6-402(2)(a). The evidence before the Court shows that no more than two members of the board were involved in non-public meetings or negotiations with Crestone regarding the Operator Agreement. Plaintiff's Exhibit 5, van Woudenberg Deposition, 84:8-85:8; Plaintiff's Exhibit 15, page 4; Defendant's Exhibit B, 48:1-16; Defendant's Exhibit L, 23:11-20. The evidence before the Court does not show a scheme designed to circumvent OML requirements but rather a conscious effort to comply with it. Because here, the evidence is clear that at no time were more than two board members present at any meeting about the Operator Agreement, the Court finds that this was not an OML violation.

Second, Plaintiffs contend that an improper meeting took place by text message or email on or around October 27, 2018. They allege that at an October 27, 2018 meeting at Rachel Balkcom's house, Trustee van Woudenberg held up his phone, displayed a chain of text messages, and stated that the Mayor was texting Trustees about the importance of the upcoming vote on the Operator Agreement. Defendant argues that the evidence only shows that Mayor Carroll texted Trustee van Woudenberg individually and because the OML permits two local board members to communicate with each other the claim fails as a matter of law.

Plaintiff's claim relies on Trustee van Woudenberg's statements at the October 27, 2018 gathering at Rachel Balkcom's house that Mayor Carroll had been texting members of the board about the vote on the Operator Agreement. However, they put forth no evidence that the Mayor's conversations were part of a group message or other form of mass communication to the board members. See Plaintiff's Exhibit 2, ¶22; Plaintiff's Exhibit 4, ¶7; Defendant's Reply Exhibit B, 39:14-40:7. Instead, there is evidence from Trustee van Woudenberg's deposition that the messages he referred to at that meeting were only between him and Mayor Carroll. TOE Exhibit H, p. 34:11-15. The Court agrees with Defendants that the OML does not place any prohibitions on two trustees from

communicating outside a public meeting as occurred here. As such, the Court finds that this was not an OML violation.

Finally, Plaintiffs also assert that there were OML violations with respect to executive sessions. Their argument is twofold: first, they argue that several executive sessions were improperly noticed, and second, they argue that during executive sessions, the board discussed matters outside the purposes of the session disclosed to the public. Plaintiffs list six alleged improper topics:

1. Whether to negotiate the Acme land use application and which trustees should be involved.
2. Whether to include the Acme site in the Crestone Operator Agreement.
3. Whether to include settlement of the odor ordinance litigation in the Operator Agreement.
4. Whether to allow the Acme Type B Application to be administratively approved by the Deputy Town Administrator.
5. Whether Crestone could meet with individual Trustees after the rejection of the Operator Agreement.
6. And, whether to hold another vote on the Operator Agreement on Sunday November 4, 2018, or whether to wait until after the election.

Defendants argue that the notice given prior to the board holding any executive session on the Operator Agreement comported with the OML. Defendants also argue that from the evidence in the record, Plaintiff cannot show that any improper topics were discussed.

The Court finds that evidence in the record does not support Plaintiff's contentions. Plaintiffs cite several parts of Mayor Carroll's deposition and a part of Trustee van Woudenberg's deposition in support of their arguments. However, at all but one of those citations, the questions was objected to on the basis of attorney-client confidentiality and not answered by the witness. The one exception is found on page 79 of Mayor Carroll's deposition. Plaintiff's Exhibit 10, 79:8-25. Plaintiff's counsel asks if the board discussed incorporating the Acme site into the Operator Agreement during an executive session. Mayor Carroll responded that she does not remember and then the question was objected to on privilege grounds. The Court cannot assume facts to be true simply because a claim of privilege was asserted in response to questions about those facts. Additionally, though not dispositive, it is notable that at the end of each executive session persons involved were given the opportunity to make a record about any matters that were improperly discussed in the meeting or to disclose any actions that violated the OML. No such records were made. The Court finds that this was not an OML violation.

Further, the Court finds that all executive sessions involving the Crestone Operator Agreement were properly noticed. The OML requires that before entering an executive session, a local public body must announce the topic for discussion, the subsection of the OML authorizing the body to meet in an executive session and identification of the particular matter to be discussed. C.R.S. § 24-6-402(4). Each time issues relating to the Operator Agreement were discussed in an executive session it was announced that the board was entering an "executive session with the Town's attorneys for the purpose of receiving legal advice on specific legal questions under C.R.S. Section 24-6-402(4)(b), regarding oil and gas. TOE Exhibits E, F, N, and V; Plaintiff's Exhibit 13, 197:6-10. Though, as Plaintiffs point out the notice could be more specific, the Court finds that as a matter of law that notice comports with the OML requirements. It clearly establishes what subsection permits the executive section. Because it explicitly informs the public that the topic of discussion is oil and gas, it also gives sufficient notice of what matters were being discussed without compromising the purpose of the executive session. As such, the Court finds that this was not an OML violation.

Finally, the Court finds that even if any of Plaintiff's claims did constitute an OML violation, that violation was cured by the November 4, 2018 meeting at which the Operator Agreement was approved. The meeting was properly noticed. Notice of the meeting was published on the Town's website on November 1, 2018. TOE Exhibit M. Notice of the meeting was also published on the Town's calendar and sent to subscribers that same day. TOE Exhibit O. A blast email was sent to a separate mailing list the morning of November 3, 2018. TOE Exhibit P. The public had an opportunity to comment on the matter. The meeting agenda shows there was a "Q + A with Citizens" on the matter that day. TOE Exhibit L, p. 18-196; TOE Exhibit N. In fact, at least one Plaintiff's members spoke on the issue that day. Defendant's Reply Exhibit B, 42:16-24. Additionally, the Court finds that approving the Operator Agreement November 4, 2018 meeting was not a "rubber stamp" of a previously determined outcome. Plaintiff contends that at the end of the meeting between Mayor Carroll, Trustee van Woudenberg, and Jason Oates, Mayor Carroll made a statement about proceeding because she was comfortable knowing the Operator Agreement would be approved. While Mayor Carroll may have felt that way, the Trustees were still able to change their votes. This is best exemplified by Trustee van Woudenberg, in fact, voting opposite of how Mayor Carroll expected following that November 1, 2018 meeting. Undisputed facts show that any OML violations were cured by the proper public hearing held on November 4, 2018. As such, Defendants are entitled to summary judgment on Plaintiff's Open Meetings Law claim.

D. Conclusion

Based on the Court's findings above, Defendant's motion for summary judgment on Plaintiff's Open Meetings Law claim is GRANTED.

So ORDERED this 18 of FEBRUARY, 2020.

BY THE COURT

Judge Thomas F. Mulvahill
Boulder District Court